THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

App. Case No. 2012-212687
Lower Case No. 2010-CP-40-3297

YANCEY ENVIRONMENTAL SOLUTIONS, LLC .....Appellant,

vs.

RICHARDSON PLOWDEN & ROBINSON, P.A. and
GEORGE HAROLD HANLIN, J.D. .....Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

The subject appeal involves a legal malpractice action (the "action") filed by Appellant Yancey Environmental Solutions, LLC ("YES") against Richardson Plowden & Robinson, P.A. ("RPR") and George Harold Hanlin, Esquire ("Hanlin") (collectively referred to hereinafter as "the Respondents"). The appeal is before this Court following the granting of a directed verdict by the Honorable Eugene C. Griffith in favor of the Respondents at the conclusion of all of the evidence.

The action began on May 17, 2010, when Appellant YES and Yancey A. McLeod ("McLeod") filed a Complaint in the Circuit Court for Richland County, South Carolina. On June 24, 2010, Respondents filed an Answer and a motion to dismiss the claims of McLeod, as an individual. On June 29, 2010, an Amended Complaint was filed, withdrawing McLeod, in his individual capacity, leaving YES as the sole named plaintiff. On July 19, 2010, the Respondents filed an Answer to the Amended Complaint, and asserted various affirmative defenses. The action then proceeded into the discovery phase.

The action was called for trial on February 27, 2012, with the Honorable Eugene C. Griffith presiding. YES presented its case, and at the close of its evidence, the Respondents moved pursuant to Rule 50, SCRCP for a directed verdict. The circuit court denied the motion. The Respondents then presented their defense. At the close of all of the evidence, the Respondents renewed their Rule 50 motion for a directed verdict. The circuit court granted the motion from the bench, and subsequently issued a formal written order setting forth the basis of its decision to direct a verdict for the Respondents (the "Order"). YES moved to alter or amend the Order. The circuit court denied that motion. This appeal followed.

I. The Directed Verdict Should be Affirmed because YES Failed to Present Evidence Showing that the Respondents Proximately Caused it Damages

The subject legal malpractice action stems from a proposed conservation easement[1] transaction that was never completed. (R. pp. 7-8; 12-13). The damages YES sought in the action consisted of the contingent consulting fee it expected to be paid had the transaction been completed. (R. pp. 12-13; p. 518, lines 8-15). YES is a company that coordinates the placement of conservation easements on real property with landowners. (R. p. 8). In the fall of 2007, YES hired the Respondents to provide tax advice to YES regarding a proposed conservation easement on a South Carolina farm owned by James C. Justice II ("Justice"), a resident of West Virginia, or an entity that he majority owned.[2] (R. pp. 1062-1064). During the time Respondents were providing tax advice pursuant to their engagement agreement with YES, McLeod, YES's principal,

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[1] A conservation easement is a type of charitable contribution by a landowner. By placing a conservation easement, a landowner agrees to impose certain permanent restrictions on the land. The easement is granted to a "qualified organization" approved by the IRS which monitors the activity on the land and enforces the terms of the easement in perpetuity, including against the landowner and subsequent purchasers. The agreed-to restrictions on the land reduce its value, but the landowner receives a tax deduction in the amount of the decrease in value. Thus, a successful conservation easement can lessen a landowner's tax liability. For a general discussion of conservation easements, *see* THE ENFORCEABILITY OF EXACTED CONSERVATION EASEMENTS, 36 VT. L. REV. 261 (2011).

[2] Record title to the subject farm is held in the name of Black River Farms, LLC. (R. p. 645, lines 20-24). The South Carolina Secretary of State has no record of this entity. The West Virginia Secretary of State has a record of two different Black River Farms, LLC. The first entity is owned by a company called Mechel Bluestone, which is a Justice entity; the second entity is owned individually by Justice, and another individual named Brian Wright. (R. p. 645, line 20-p. 648, line 2). YES contends that Justice Family Farms owned Black River Farms by private agreement. (R. p. 649, lines 21-25). YES also contends that Black River Farms is owned by Justice Family Farms, which is owned by James C. Justice Companies, Inc., which is majority owned by Justice. (Brief of Appellant, p. 7). The actual ownership is unclear. The issue of ownership is unimportant, however, because as discussed herein, the evidence adduced at trial showed that Justice was the ultimate decision-maker, and in complete control.

received a letter on December 19, 2007, from the Internal Revenue Service ("IRS"). (R. pp. 1071-1075).

The letter notified McLeod that it was investigating his past involvement in conservation easement transactions to determine if he had wrongfully promoted tax avoidance schemes.[3] When the Respondents learned of the IRS investigation, they withdrew from representation of YES on December 20, 2007. The Respondents withdrew because they previously represented other landowners on a number of the conservation easements that were under investigation. (R. p. 1077). Accordingly, the Respondents determined that a conflict existed that required them to withdraw from their representation of YES. (R. p. 1077; p. 754, line 20-p. 755, line 23; p. 766, line 21-p. 768, line 18).

After McLeod received notice of the IRS investigation, he immediately hired independent counsel, Crosby Lewis, Esquire, to represent him in the investigation. (R. p. 452, line 20-p. 454, line 17). With that counsel, McLeod held a conference call to notify Justice of the IRS investigation. (R. p. 454, line 18-p. 455, line 15). During that conference call, however, McLeod did not notify Justice that the Respondents had withdrawn from their engagement with YES. (R. p. 455, line 23-p. 456, line 1; p. 546, line 21-p. 547, line 5; p. 548, lines 7-18). Instead, McLeod stated that that he was under investigation by the IRS, and recommended to Justice that the proposed conservation

[3] After ten months, the IRS notified Mr. McLeod that it was discontinuing its investigation into whether he was liable for a penalty under IRC §§ 6700 and 6701. McLeod was further advised that the letter "should not be construed to mean that the Internal Revenue Service (IRS) approve[d] [his] conduct; rather, it [was] simply a notice that [the IRS'] investigation ha[d] been discontinued at [that] time." (R. p. 1078).

easement transaction be postponed until the IRS investigation was concluded. (R. p. 533, lines 7-25). Justice agreed. (R. p. 455, lines 3-17; p. 455, line 23-p. 456, line 1).

YES's Amended Complaint contained three claims: professional negligence, breach of fiduciary duty, and breach of contract. (R. p. 26, ¶ 31-p. 30, ¶ 59). All three of those claims allegedly arose from the Respondents' withdrawal of their representation of YES on December 20, 2007. (R. p. 26, ¶ 31-p. 30, ¶ 59). YES alleged that the withdrawal proximately caused injury to YES. To support YES's claims, McLeod testified that the IRS investigation had nothing to do with Justice's proposed conservation easement not closing. Rather, McLeod testified that the proposed conservation easement did not close because the Respondents withdrew from their representation of YES. (R. p. 532, line 15-p. 533, line 25; p. 534, line 24-p. 535, line 3). McLeod testified that if the Respondents had not withdrawn, he would have recommended that Justice proceed with the conservation easement. (R. p. 532, line 15-p. 533, line 25; p. 534, line 24-p. 535, line 3). He further testified that he was confident that if he had made such a recommendation to Justice, Justice would have proceeded with the transaction and that it would have closed, resulting in an approximate $1.6 million dollar consulting fee to YES, depending on the size of the valuation appraisal from the qualified appraiser. (R. p. 518, lines 8-15).

In order to prove its claims, YES was required to submit proof that **after** Justice learned of the IRS investigation into McLeod's previous work on other conservation easements, **if** McLeod had recommended that Justice proceed instead of postpone, Justice would have followed McLeod's recommendation and closed on the conservation easement. Evidence of what Justice would have done in this hypothetical scenario was

the crucial link in the causation chain. In a statement to the circuit court regarding this case, counsel for YES made this point explicitly:

> Legal malpractice cases all hinge on things that didn't happen and always having to prove, in a litigation matter, a case within a case, and in a transaction matter, 'we would proceed if proper advice had been given,' were always in hypothetical land.

(R. p. 406, lines 14-19). YES never presented the required hypothetical testimony from Justice—that is, YES never presented testimony that Justice would have proceeded with the closing had McLeod made a recommendation to close the conservation easement at the same time it notified Justice of the IRS investigation. Indeed, YES never presented **any** testimony from Justice. Accordingly, the circuit court properly directed a verdict for the Respondents.

A. The Timeline

In the spring of 2007, McLeod, on behalf of YES, began discussions with Justice about a potentially profitable wetlands mitigation bank involving Black River Farm (the "Farm"). (R. p. 354, line 10-p. 361, line 14; p. 707, lines 4-25). The Farm is a working commercial farm, located on a 4500-acre tract in Clarendon County, S.C. At all times pertinent to this action, the Farm was owned by either Justice or an entity that he majority owned.[4] (R. p. 268, line 20-p. 269, line 1). Justice is a very wealthy businessman from West Virginia. (R .p. 231, line 8-p. 234, line 22; p. 619, line 8-p. 622, line 17; p. 934, lines 20-23).

As noted, McLeod initially proposed that Justice establish a wetlands mitigation bank on the Farm. (R. p. 354, lines 18-22). A wetlands mitigation bank is generally created when a landowner rehabilitates land that once contained wetlands to its pre-

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[4] *See* n.2, *supra*.

development state. McLeod informed Justice that in order to establish a wetlands mitigation bank he would have to flood significant portions of the land.[5] Because the Farm is a working commercial farm, Justice's son did not like the idea of establishing a wetlands mitigation bank. (R. p. 363, line 15-p. 364, line 4).

On August 3, 2007, McLeod traveled to West Virginia to meet with Mr. Justice and tour another tract of land Justice owned and on which Justice was considering placing a conservation easement. (R. p. 365, line 19-p. 366, line 11). After that meeting in West Virginia, and in light of Justice's son's reluctance to create a wetlands mitigation bank on the Farm, McLeod and Justice began to explore whether a conservation easement could be placed on the Farm. (R. p. 366, line 18-p. 367, line 7). Justice was the ultimate decision-maker regarding the proposed conservation easement transaction. (R. p. 934, lines 20-23; p. 268, line 24-p. 269, line 1; p. 563, line 16-p. 563, line 8; p. 575, line 19-p. 576, line 6; p. 584, lines 5-15; p. 639, line 17-p. 640, line 3).

On or about late October to early November 2007, McLeod contacted Hanlin at RPR for the first time about providing YES with tax advice related to the proposed conservation easement on the Farm. (R. p. 367, lines 22-24; p. 369, lines 5-9; p. 371, lines 4-17; p. 707, line 4-p. 709, line 2). Around that time, Hanlin brought to McLeod's attention an organization known as Community Open Land Trust ("COLT"). Hanlin indicated that he served on the Board of COLT and believed that it might be interested in serving as the qualified donee organization for the proposed conservation easement on the Farm. (R. p. 369, lines 16-21; p. 716, lines 7-17).

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[5] For a general discussion of wetlands mitigation banks, *see* PROTECTING SOUTH CAROLINA'S WETLANDS IN THE WAKE OF SOLID WASTE AGENCY, 53 S.C. L. REV. 757 (2002).

McLeod contacted an appraiser, Dr. Darroll Hawkins ("Hawkins") of Highview Engineering, about submitting a proposal for the requisite appraisal of the Farm. On November 16, Hawkins transmitted a proposal to McLeod describing the information he needed to complete the appraisal, the time that would be required, and the cost of the appraisal. (R. pp. 1079-1081).

On or about November 26, 2007, McLeod forwarded to Justice a Consulting Services Agreement ("the Draft Agreement"). (R. pp. 1050-1059). The proposed parties to the Draft Agreement were James C. Justice, Justice Family Farms, LLC and Natural Resource Protection & Mitigation, LLC. (R. pp. 1052; 1058). The Draft Agreement referred to James C. Justice, individually, and Justice Family Farms, LLC collectively, as the Owners. (R. p. 1052) (stating "hereinafter collectively referred to as 'Owner'"). The opening "Whereas" clause of the Draft Agreement stated that "Owner is interested in exploring opportunities for conservation of certain real estate . . . ." (R. p. 1052). The Draft Agreement required Justice to first pay a $50,000 "non-refundable retainer" and then 5% of the conservation value of the property. (R. pp. 1052-1053). Consistent with the definition of Owner and the proposed parties, the Draft Agreement contained separate signature blocks for both Justice and Justice Family Farms, LLC. (R. p. 1058). Neither Justice nor an officer of Justice Family Farms, LLC ever signed the Draft Agreement, and the $50,000 non-refundable retainer was never paid.[6] (R. p. 558, line 16-p. 559, line 8).

Notwithstanding the absence of the $50,000 retainer and the un-executed copy of the Draft Agreement, YES and the Respondents continued their work on the creation of a

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[6] Ultimately, YES did receive a check for $15,000 from James C. Justice Companies, Inc. The check was issued on November 13, 2008, well after the project had been abandoned. (R. p. 1069).

conservation easement on the Farm. On December 5, 2007, Hanlin formalized his representation of YES in the engagement letter. (R. pp. 1062-1064).[7]

Then, on December 19, 2007, McLeod's administrative assistant, Mary Mohr ("Mohr"), opened a letter from the Internal Revenue Service that was addressed to McLeod. (R. pp. 1071-1075). The letter stated as follows:

> We have reviewed materials regarding your participation in tax avoidance transactions. We are considering penalties and injunctions under Internal Revenue Code sections 6694, 6695, 6700, 6701, 7402, 7407 and 7408 for promoting and/or preparing documents relating to these transactions. **In addition, we will consider issuing "pre-filing notification" letters to the persons who have participated in these transactions.**

(R. p. 1071) (emphasis added).

The following day, Mohr e-mailed the letter from the IRS to Hanlin stating, "I am attaching a very serious letter from the IRS received in the mail yesterday—Debra and I have reviewed, but, and this is important—I have not shown this to Yancey [McLeod] and unless you tell me otherwise, I do not want him [McLeod] to see this, or know about this, until after Christmas." (R. p. 1070). Hanlin promptly called Mohr and told her to show the IRS letter to McLeod. (R. p. 752, line 2-p. 753, line 7; p. 755, line 24-p. 756, line 5).

That same day, Hanlin discussed with management at RPR the implication of the IRS letter upon his current representation of YES and his past representation of the

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[7] The Respondents specifically agreed to provide the following representation: "Consultations with and the provision of legal tax advice to [YES], and consultations with tax advisors to Jim Justice regarding the conservation easement being considered for the property." (R. p. 1062). The Respondents limited the engagement as follows: "Our legal responsibilities are limited to the services specified above, and it is expressly understood that this Firm will not be responsible to pursue any additional matters beyond those stated in Paragraph 1 above . . . ." (R. p. 1062).

landowners whose easements were under investigation. (R. p. 756, lines 5-11; p. 757, line 14-p. 758, line 17; p. 760, line 25-p. 761, line 12). After those discussions with RPR management, Hanlin informed McLeod that he and RPR were withdrawing from further representation of YES. (R. p. 760, lines 11-24). On December 21, 2007, Hanlin memorialized his withdrawal in a letter to McLeod. (R. p. 1077; p. 762, lines 4-10). In pertinent part, Hanlin's letter stated that "the IRS notice which you [McLeod] received on Wednesday, December 19, 2007, pertains to projects that I have worked on as well, and you and I could find ourselves in a position of conflict. For that reason, it is best that others represent you from the beginning." (R. p. 1077).

On December 24, 2007, McLeod telephoned Justice in West Virginia to inform him of the IRS investigation, and to recommend that the project be postponed. Also in attendance in West Virginia for the telephone call were David Harrah (Justice's accountant) and Stephen Ball (Justice's in-house lawyer). Harrah testified that McLeod never mentioned that the Respondents had withdrawn from their representation of YES. (R. p. 619, lines 2-4). McLeod's testimony mirrored that of Harrah. McLeod testified that on the December 24, 2007, telephone call he never told Justice or Harrah that the Respondents had withdrawn. (R. p. 532, line 21-p. 533, line 2). Harrah also testified that during that telephone call, McLeod stated that the IRS letter "called into question some of these types of transactions and that he couldn't in good conscience move forward with this transaction." (R. p. 618, line 22-p. 619, line 1). Accordingly, the proposed conservation easement on the Farm was postponed.[8]

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[8] In defense of the IRS investigation, McLeod also retained the services of Mr. Cary H. Hall, Jr., Esquire ("Hall") (Hall's first name was misspelled "Kerry" in the trial transcript). Hall's testimony was introduced at trial through his deposition. Hall

On December 27, 2007, McLeod sent an e-mail to Justice referencing their call on December 24, advising Justice that all of the work done to-date could be used when the project was recommenced. He also forwarded an invoice for the requested $50,000 initial consulting fee. (R. pp. 1083-1084). Also on December 27, McLeod e-mailed Sue Green of COLT informing her that "Mr. Justice has decided to postpone the project." (R. p. 466, line 22-p. 467, line 14). The following day, McLeod e-mailed the appraiser, Hawkins, as well has his business partner in NRPM, Jim Lewis, informing them that "Jim Justice has decided to postpone the conservation project on the Black River tract in Clarendon County, SC." (R. p. 1085; p. 470, lines 6-21). McLeod advised Hawkins and Lewis to send their final invoices directly to Harrah. (R. p. 1085; p. 470, lines 6-21). The proposed conservation easement on the Farm was never revived.

B. Justice was the Decision Maker

YES's damages claim in this case is based upon terms found in the un-executed Draft Agreement. That agreement contemplated that if the conservation easement were closed and used for a tax deduction, YES would be entitled to 5% of the conservation value of the property. Evidence adduced at trial showed that Justice stated that the proposed 5% commission should be reduced to 4%. (R. p. 624, lines 8-19). There is also trial testimony that Justice instructed YES to begin work on the proposed conservation easement project. (R. p. 366, line 18-p. 367, line 7; p. 548, line 19-p. 549, line 8). Viewing the evidence in the light most favorable to YES, evidence was introduced at trial tending to show that YES and Justice entered into an oral contract for YES to provide preliminary services related to the proposed conservation easement. Pursuant to that oral

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testified that the proposed Justice conservation easement was "abandoned because of [the] IRS letter." (R. p. 691, line 22-p. 692, line 4; p. 1082).

contract, YES and McLeod looked to Justice to make every decision regarding the proposed conservation easement. For that reason, YES was required to present the testimony of Justice as to what he would have done **if** YES had suggested that he consummate the proposed conservation easement, notwithstanding the IRS investigation.

The following trial testimony from various witnesses conclusively shows that Justice was the decision-maker.

1. McLeod's Testimony

McLeod acknowledged repeatedly during his testimony that every decision related to the conservation easement would ultimately be made by Justice:

> Q: Isn't it also true with respect to the conservation easement that was proposed for the Black River Farm Mr. Justice had no obligation, even if he had signed one of your consulting agreements he had no obligation to do it, isn't that right?
>
> A: Sure.

(R. p. 563, lines 16-22).

> Q: So there is also a risk that he might at the very last minute just decide, "You know what, I don't want to do it"?
>
> A: Absolutely, that would be a possibility.
>
> Q: That would have been his right under this agreement, right?
>
> A Of course.
>
> . . .
>
> Q: Just as you didn't give any guarantee to Mr. Justice of what might be his actual charitable deduction, right?
>
> A: Well, I wasn't expecting him to make the final decision to execute these documents and record it and place a permanent easement on his property without having some idea what the expected charitable gift would be.

(R. p. 564, lines 2-8; lines 12-19).

Q: All right. Oh, the closing date was December 31st?

A: Everything was to be done by December 31st in order for Mr. Justice to have the charitable gift in the calendar year 2007.

(R. p. 569, lines 12-16).

Q: And even up until the 12/31 this is a deal that just might not have gone forward, no matter what, whether Mr. Hanlin was involved or anybody else, right?

A: Well, that would have been his call for sure.

Q: It would have been Mr. Justice's call?

A: Right

(R. p. 575, line 25-p. 576, line 6).

Q: All right. And in any event, Mr. Justice would have to have input into those draft restrictions, right, or whatever restrictions you put in the easement, right?

A: Well, he would ultimately have to approve the document but I think he trusted me to put in the language on the reserve right to accomplish his stated objective of keeping it as a farm.

Q: You would have sent them to Mr. Justice for review?

A: Of course.

(R. p. 584, lines 5-15).

2. Miller's Testimony

James T. Miller, the Rule 30(b)(6) designee and treasurer for Justice Family Farms, LLC, testified at trial by videotaped deposition. (R. p. 881, lines 9-18). In his deposition he stated that he had worked for Justice for 27 years. (R. p. 892, lines 4-5). In unequivocal terms, Miller testified that Justice was the ultimate decision-maker:

Q: Mr. Justice, II, is the ultimate decision maker in these companies. Correct?

A: He's the majority owner, that's correct, and the ultimate decision maker.

Q: The buck stops with him, so to speak?

A: That's correct.

(R. p. 934, line 20-p. 935, line 2).

3. Harrah's Testimony

Harrah, the former in-house accountant to Justice, testified at trial. (R. p. 605, line 22-p. 606, line 2). Harrah was designated by Justice to oversee the work on the proposed conservation easement. (R. p. 608, lines 9-24). Throughout his questioning, he consistently referred to Justice as the person that would ultimately decide on matters pertaining to the proposed conservation easement. The following transcript citations from the trial make this very point.

> Q: Mr. Pendarvis mentioned the December 24 phone call. Describe for the jury how Mr. Justice reacted when he was told that the easement was not going to go forward?
>
> A: First of all I didn't recall that Mr. Justice was part of the phone call but I think my impression is – well, it is not my impression, it's the way it would be. If Jim wanted to go through and have this done by 12/31/2007 he would have done it regardless of what I thought, Mr. McLeod thought, if he thought that is what he wanted to do he would have done it.
>
> Q: And tell the jury why you believe that about Mr. Justice.
>
> A: Well, I mean, he's the guy that makes the decisions and whenever he sold his company he went completely opposite of the advice of Goldman Sachs and did it the way he wanted to do it. If he wants to do it he'll do it, that is just the way Jim [Mr. Justice] is.

(R. p. 639, line 10-p. 640, line 3).

> THE WITNESS: I think, I guess the best thing that I can say in that regard is, you know, it was my understanding that these documents were being prepared to close on December 31, okay? If on December the 24 someone had come in like Mr. McLeod did and said, "I don't think I can in good conscience go forward with this," if he had said there were some other reason, "I physically can't do it, I have some kind of an issue," and Jim really wanted to do that he would have closed that transaction . . . .

BY MR. PENDARVIS:

Q. But up until that point it is your understanding Mr. Justice was continuing to proceed with this transaction?

A. Well, Mr. Justice saw the same documents that I did and knew the dating that was put in those documents but I don't know that we hadn't seen some of these, what the easement meant, what the restrictions meant in black and white, I guess, on that particular property, so that would be a decision that he would have made after he saw that and understood what that really meant to him.

(R. p. 635, line 17-p. 636, line 1; p. 636, lines 7-18).

Q. Now, when we, you were telling me back in your deposition in December that, and you testified that you understood that the goal was to finish this conservation easement by the end of 2007?

A. Well, what I said, the goal that Mr. McLeod was working on was to do that and for the various reasons that he had, I'm just not sure that, I'm not sure I understood that was a drop dead date for Jim [Mr. Justice].

(R. p. 631, line 20-p. 632, line 4).

4. <u>Professor Greg Adams' Testimony</u>

Professor Greg Adams ("Adams") testified as YES's expert witness regarding the professional duties owed by a lawyer. During his cross-examination, he agreed with all of the testimony detailed above:

Q: This property, you don't deny that the property involved was owned by Mr. Justice, correct, or some corporate entity?

A: One of his entities, right.

Q: But there is no denying that Mr. Justice was the final decision maker, right?

A: Of course.

(R. p. 268, line 20-p. 269, line 1).

The evidence introduced at trial established that Justice was the ultimate decision-maker with regard to the proposed conservation easement. Accordingly, YES was

required to affirmatively present evidence that, notwithstanding the IRS investigation, if McLeod had recommended proceeding with the conservation easement, Justice would have done so.

C. The Circuit Court's Ruling

At the close of all of the evidence, the Respondents renewed their Rule 50, SCRCP motion for a directed verdict. Following argument by counsel for the parties, the circuit court ruled from the bench. The court noted that:

> I think I have wrestled with this whole thing since summary judgment motions but I don't believe, looking at the facts, there is a question of fact to submit to the jury about what Justice would have done or didn't do, I don't see it. I think his failure to present an affidavit, his failure to testify, present a deposition, as to what he would have done or wouldn't have done, it isn't here and that is breaking the causal link, the proximate cause to the breach, the damages. I can't tie it together and for that reason I'm going to grant the directed verdict.

(R. p. 869, line 20-p. 870, line 7).

After the circuit court ruled from the bench, it memorialized its ruling in a formal written Order. (R. pp. 5-14). In that Order the circuit court noted that, "YES's theory at trial was that if RPR and Hanlin had not withdrawn from representing it on December 20, 2007, it would have changed its recommendation to Justice during the telephone conference on December 24, 2007 from 'postpone' to 'proceed.'" (R. p. 11). The court noted that, "[b]ecause YES did not inform Justice of the fact of the defendants' withdrawal . . . , it is clear there is no direct evidence that the withdrawal caused Justice not to proceed." (R. p. 11). The court reasoned that only two explanations existed for why the proposed conservation easement did not close: (1) "it was either the disclosure of the IRS investigation," or (2) "the recommendation from McLeod that Justice postpone

the conservation easement." (R. pp. 11- 12). Accordingly, the court correctly concluded that in order for YES to have presented a question of fact for the jury, it was required to "offer some scintilla of evidence that, had McLeod recommended that Justice proceed with the proposed conservation easement in the face of the IRS investigation, rather than postpone, Justice most probably would have done so in December of 2007." (R. p. 12). From that line of reasoning, the circuit court correctly concluded that YES's failure to present evidence regarding proximate cause—that is, what Justice would have done—required it to grant a directed verdict. (R. p. 12).

The record of this trial is silent as to what Justice's decision would have been if he had received a recommendation from McLeod to proceed with the conservation easement, notwithstanding the IRS investigation. For that reason, the circuit court properly issued its Order granting a directed verdict.

D. Proximate Cause and the Standard of Proof

The central question in this appeal is whether YES presented a question of fact on the issue of proximate cause. South Carolina courts routinely decide issues of proximate cause, as a matter of law. *E.g.*, *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 288, 701 S.E.2d 742, 748-49 (2010) (affirming summary judgment and finding that legal malpractice claim failed "for lack of proximate cause"); *McKnight v. S.C. Dept. of Corrections*, 382 S.C. 380, 386-90, 684 S.E.2d 566, 568-71 (Ct. App. 2009). As noted above, YES's Amended Complaint enumerated three claims: (1) professional negligence, (2) breach of fiduciary duty, and (3) breach of contract.

1. Professional Negligence

The professional negligence claim requires a showing of: (1) the breach of a duty by RPR and Hanlin; (2) damages to YES; and (3) that the breach **proximately caused** the

damages to YES. *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996) (emphasis added).

2. Breach of Fiduciary Duty

In order to establish a claim for breach of fiduciary duty, a plaintiff must show: (1) the existence of a fiduciary duty; (2) a breach of that duty owed to YES by the Respondents; and (3) damages **proximately resulting** from the wrongful conduct of the Respondents. *RFT Mgmt. Co. v. Tinsley & Adams, LLP*, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (Ct. App. 2012) (emphasis added). In South Carolina, in a legal malpractice action, a claim for breach of fiduciary duty arising out of the same facts is duplicative of the legal malpractice claim. *Id.* at 337, 732 S.E.2d at 173 (holding that where breach of fiduciary duty claim arises out of the same facts as legal malpractice claim, it is duplicative of legal malpractice claim).

3. Breach of Contract

A breach of contract claim requires a showing of: (1) the existence of the contract; (2) its breach; and (3) the damages caused by such breach. *Branch Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a **proximate result** of such breach." *Id.* (citation omitted) (emphasis added).

4. Proximate Cause

The standard of proof for each of YES's claims required it to affirmatively present evidence of proximate cause. "Ordinarily proximate cause is a question for the jury, but when the evidence is susceptible to only one inference, it becomes a matter of law for the court. *McKnight*, 385 S.C. at 387, 684 S.E.2d at 569. "Proximate cause is the

efficient or direct cause; the thing that brings about the complained of injuries." *Id.* at 387, 684 S.E.2d at 569. Proximate cause requires both causation in fact and legal cause. *Id.* at 386-87, 684 S.E.2d at 569.

"Causation in fact is demonstrated by establishing the plaintiff's injury would not have occurred 'but for' the defendant's [conduct] . . . ." *McKnight*, 385 S.C. at 386-87, 684 S.E.2d at 569. YES was required to show that but for the withdrawal of the Respondents, McLeod would have recommended that Justice close on the proposed conservation easement **and** Justice would have closed on the conservation easement. In order to prove that Justice would have gone forward, YES was required to present the testimony of Justice. As the circuit court stated in its written Order granting a directed verdict, YES was required to show that, "had McLeod recommended that Justice proceed with the proposed conservation easement in the face of the IRS investigation, rather than postpone, Justice most probably would have done so in December of 2007." (R. p. 12).

The circuit court correctly applied the law in directing a verdict for the Respondents on this issue. During the oral motion for reconsideration, the circuit court noted that the testimony showed "consistently [that] Jim Justice does exactly what Jim Justice wants to do or intends to do and there is nothing for me, before me from Jim Justice to say, 'We would have done the deal.' (R. p. 872, lines 9-12). The court continued, "I can't figure out, I didn't figure out why he wasn't asked something or wasn't provided, I can't figure that out. That is not my problem, not my duty. But Justice never said what he would have done and I can't get away from that . . . ." (R. p. 872, lines 12-17). The circuit court correctly determined that YES failed to prove that Respondents' withdrawal proximately caused its alleged damages.

5. Breach of Fiduciary Duty Does Not Have a Lessened Standard of Proof

In an effort to avoid the proximate cause requirement, YES argues in its brief that a claim for breach of fiduciary duty has a lessened standard of proof—that is, that it did not need to present evidence of proximate cause on that claim. (Appellant's Brief, at pp. 19-21). This issue was raised for the first time in Appellant's Rule 59 motion to reconsider the Order granting a directed verdict. (R. pp. 990-1035). Accordingly, it is not preserved for appellate review. Issue preservation aside, it is not the law of this state.

i. Issue Preservation

A party may not use a post-trial motion to reconsider to raise an argument for the first time. *Kiawah Property Owners Group v. Public Service Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004). Rather, the party is required to raise the issue to the circuit court before it makes a ruling. S*ee Queens Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006). During trial, the Appellant had two opportunities to advance its theory that damages for breach of fiduciary duty contain a lessened standard of proof: (1) in opposition to the Respondents' Rule 50 motion at the close of YES's case-in-chief, and (2) in opposition to the Respondents' Rule 50 motion at the close of all of the evidence. The Appellant did not advance this legal theory at the proper time.

In fact, during argument on the first Rule 50 motion, Appellant offered a different argument than the one advanced in its brief before this Court:

> Now . . . the claims in the case deal[] with breach of fiduciary duty. . . . [And] when we looked at the, even the negligence case and even if the Court were to lump the b[reach] of fiduciary case into the professional negligence case, proximate cause has two components. There is a

> causation in fact, that's but for, and there is a second cause, the legal cause, and the legal cause is for[e]seeability.

(R. p. 684, lines 15-24). During the argument on the second Rule 50 motion, the Appellant did not raise this issue. (R. p. 839, line 16-p. 869, line 14). The first time that the Appellant raised this issue was in its Rule 59, SCRCP motion to reconsider the Order granting a directed verdict. (R. pp. 990-1035). Accordingly, this issue is not preserved for appellate review. *Kiawah Property*, 359 S.C. at 113, 597 S.E.2d at 149.

ii. Appellant's Argument is Not the Law

YES argues that in South Carolina, a plaintiff need only prove that the defendant's conduct was a "substantial factor" in bringing about any loss caused by a breach of fiduciary duty, not that the breach had to be the "but-for" proximate cause of the loss. In other words, YES claims that the circuit court erred in requiring it to prove that the Respondents' alleged breach of fiduciary duty proximately caused the proposed conservation easement deal not to close. To support this argument, YES relies on one case from South Carolina: *Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005). However, that case does not stand for the proposition YES claims that it does.

In *Smith v. Hastie*, the trial court granted summary judgment in favor of an attorney on the plaintiff's causes of action, among which was a claim for breach of fiduciary duty. In that case, Smith accused her husband's attorney, Hastie, of breaching his fiduciary duty to her when he advised that Smith and her then-husband enter into and contribute property to a family limited partnership. *Id.* at 413, 626 S.E.2d at 15. The allegations centered on the fact that the couple had just unsuccessfully ended their

marriage counseling sessions and were on the brink of separation. *Id.* at 413, 626 S.E.2d at 14-15.

The court of appeals reversed the trial court's grant of summary judgment, relying on, among other things, the affidavit Smith presented from another estate planning attorney. *Id.* at 419, 626 S.E.2d at 18. In that affidavit, the attorney opined that Hastie should have advised Smith of the financial ramifications she would suffer in the event of a divorce. Accordingly, the court of appeals found some evidence to support Smith's claim that summary judgment was improper. In so finding, the court quoted from *Moore v. Moore,* 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004), and explained, "'One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.'" *Smith*, 367 S.C. at 417, 626 S.E.2d at 17 (quoting *Moore*, 360 S.C. at 253, 599 S.E.2d at 473).

Based on that quote from *Smith*, YES asserts that South Carolina employs a less stringent causation standard in breach of fiduciary duty cases such that a plaintiff need not prove that the breach of duty was the proximate cause of the damages alleged. YES argues a lesser standard applies, which it describes as the "resulting from" standard or "substantial factor" standard. Not only does this isolated quote from *Smith* **not** create a lesser standard, but the very case from which the *Smith* Court lifted the quote specifically describes the causation standard South Carolina courts employ with regard to breach of fiduciary duty claims: "In a breach of fiduciary case, the plaintiff is entitled to damages for harm **caused by** the breach of a fiduciary duty owed to him or her. Damages in an action for breach of a fiduciary duty are those **proximately resulting from** the wrongful conduct of the defendant." *Moore*, 360 S.C. at 253, 599 S.E.2d at 473 (emphasis added);

accord RFT Mgmt. Co. v. Tinsley & Adams, LLP, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (Ct. App. 2012).

YES cites to no other South Carolina authority for its improper legal proposition. To the extent other jurisdictions may have a different standard, those standards are not the law of South Carolina.

II. The Rule 30(b)(6) Testimony of Miller

A. Miller's Testimony Did Not Create a Question of Fact Regarding Proximate Cause

Miller testified as the corporate designee for the deposition of Justice Family Farms, LLC.[9] As the corporate designee, Miller's testimony bound Justice Family Farms, LLC. At a Rule 30(b)(6) deposition, the "corporation appears vicariously through its designee." *Int'l Assoc. of Machinists and Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479, 487 (D. Md. 2005). For that reason, the testimony "represents the knowledge of the corporation." *Id.* The Rule 30(b)(6) deposition did not bind Justice, individually. Accordingly, the Justice Family Farms, LLC's deposition could not serve as a substitute for Justice's required testimony.

In YES's brief before this Court, it acknowledges that the oral contract was between YES and Justice: "Mr. McLeod and James C. Justice, II (Mr. Justice) entered into an agreement in October 2007 whereby Mr. McLeod's company, YES, would coordinate" the placement of a conservation easement. (Brief of Appellant, p. 6). This acknowledgement is fatal to YES's effort to utilize the Rule 30(b)(6) deposition of Miller

[9] As noted in n.2 *supra*, the ownership of the Farm was never conclusively established at trial. But even assuming, *arguendo*, that Justice Family Farms, LLC owned the Farm, as discussed herein and below, because Justice was a party to the oral contract and the ultimate decision-maker, YES was required to present his testimony. For that reason, the testimony of Miller did not create a factual question regarding proximate cause.

to speak for Justice. Justice was the other party to the agreement; accordingly, without his testimony YES was unable to create a question of fact regarding proximate cause. There is not a scintilla of evidence in the record of this trial as to what Justice would have done.

Notwithstanding YES's acknowledgment that the oral agreement was between YES and Justice, it also endeavors to argue that Justice Family Farms, LLC was a party to the oral agreement (Brief of Appellant, Statement of the Case, p. 3) and that the company's testimony alone was sufficient to create a question of fact. But even assuming it was a party, it was only a co-party. And when a contract contains two parties on one side, the assent of each is required to enforce the contract. *See Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956) (noting that where multi-party contract required signatures from all parties, it could not be enforced when one party did not sign). Accordingly, for YES to prove its case it was required to present the testimony of Justice.

B. <u>The Intent of Justice Family Farms, LLC is Not at Issue</u>

This appeal has nothing to do with Justice's or Justice Family Farms, LLC's intent to work toward the completion of a proposed conservation easement. At trial, YES presented testimony to the general effect that Justice agreed for YES to take the preliminary step for Justice to later determine whether to place a conservation easement on the Farm. (R. p. 548, line 19-p. 549, line 8). In its brief, YES argues that Justice and Justice Family Farms, LLC intended to place a conservation easement on the Farm. (Brief of Appellant, pp. 8-9, 17). For example, on page 17 of YES's brief it states that "testimony regarding Justice Family Farms [LLC's] intent and Mr. Justice's intent to close on the conservation easement was sufficient to send the proximate cause issue to the jury." (Brief of Appellant, p. 17). But the central question of this appeal is not intent;

it is whether Justice would have agreed to place a conservation easement on the Farm, notwithstanding the IRS investigation, if McLeod had made that recommendation. The record in this case, however, is void as to what Justice would have done in that situation. Accordingly, the circuit court properly granted a directed verdict for the Respondents.

C. The Circuit Court Properly Excluded the Hearsay Portion of Miller's Testimony

During the deposition of Justice Family Farms, LLC's Rule 30(b)(6) deposition, the designee, Miller, was asked to respond to a hypothetical question.

> Q. Thank you. Now, I want you to make an assumption to answer the next question I'm going to ask you and the assumption is this, assume for the purposes of this coming question that -- notwithstanding the IRS letter, that during the call on December 24th, 2007, Yancey McLeod recommended that Justice Family Farms move forward with the easement, assume that, and he made a recommendation to move forward with the easement. Using that assumption, was it more likely than not that Justice Family Farm would have proceeded with the conservation easement?
>
> MR. LEONARDI: Object to form.
>
> A. Yes.

(R. p. 909, lines 2-15). During the trial of this case, YES sought to introduce the above testimony, and the Respondent renewed its objection. Each side then presented argument regarding its admissibility. (R. p. 650, line 19-p. 683, line 1). The circuit court sustained the Respondents' objection and ruled that the above colloquy could not be presented for the jury's consideration. The circuit court properly excluded the above colloquy.

The testimony from Miller, as to what Justice would allegedly have done had he received a different recommendation from McLeod, was hearsay and was properly excluded. Rule 801, SCRE. Miller testified in his deposition that he had one

conversation with Justice in preparation for his deposition as Justice Family Farms, LLC's Rule 30(b)(6) designee and as part of that conversation, allegedly learned something of Justice's intent regarding the proposed conservation easement. (R. p. 922, lines 4-12). The purpose for which YES offered this testimony—to establish Justice's intent—is classic hearsay. That is, the alleged statements to Miller by Justice are out of court statements offered to prove the truth of the matter asserted (*i.e.*, that Justice intended to go forward with the proposed conservation easement). *See* Rule 801(c), SCRE (defining hearsay).[10] No exception to the hearsay rule salvages this testimony.[11]

The fact that Miller was serving as Justice Family Farms, LLC's Rule 30(b)(6) designee at the time of this testimony is irrelevant to the hearsay analysis. "[T]he fact that a witness is a 30(b)(6) witness does not create a hearsay exception allowing him to simply repeat statements made by corporate officers and employees, if those statements are being offered for their truth." *Cooley v. Lincoln Elec. Co.*, 693 F. Supp. 2d 767, 791 (N.D. Ohio 2010); *see also Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 435 (5th Cir. 2006) (noting that Rule 30(b)(6) deponent "could not offer any testimony at trial . . . to the extent that information was hearsay not falling within one of the authorized exceptions"). This rule "holds especially true when there is no independent evidentiary basis that might otherwise prove the truth of the hearsay, such as corroborating testimony

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[10] Justice's statements to Miller are not a prior statement by a witness testifying at trial or an admission of a party-opponent. Accordingly, the provisions of Rule 801(d)(1) and (2), SCRE, do not apply.

[11] Specifically, exceptions (1) through (3) do not apply because Justice's statements were not made contemporaneously with the events mentioned in the statement (i.e. consideration of the easement). Exception (4) does not apply because the statements were not made for purposes of medical diagnosis or treatment. Exceptions (5) through (18) do not apply because the statements are not records or recordings. Exceptions (19) through (21) do not apply because the statements did not address reputation. Exceptions (22) and (23) do not apply because the statements are not judgments.

from the hearsay declarant." *Cooley*, 693 F. Supp. 2d at 792; *see also Sara Lee Corp. v. Kraft Foods Inc.*, 276 F.R.D. 500, 503 (N.D. Ill. 2011) (discussing dangers of allowing a corporate designee to testify as a fact witness in lieu of the actual witness to the facts). "Numerous courts have rejected hearsay evidence by a corporate deponent when there is no additional evidence to support the statements." *Century Pacific, Inc. v. Hilton Hotels Corp.*, 528 F. Supp. 2d 206, 215 n.5 (S.D.N.Y. 2007) (citing *Digene Corp. v. Ventana Med, Sys., Inc.*, 316 F. Supp. 2d 174, 181 n. 10 (D. Del. 2004); *Efferson v. Kaiser Aluminum & Chem. Corp.*, 816 F. Supp. 1103, 1116 n. 31 (E.D. La. 1993)).

Here, there is no other evidence to corroborate that Justice would have gone forward with placing the conservation easement had defendants not withdrawn from representation of YES. YES's sole evidence on this critical point is Miller's hearsay statement of Justice's alleged intent. The Respondents had no ability to cross-examine Justice regarding the truth of his intent as allegedly expressed in this private conversation. Every indicia of hearsay is present. *See Hall v. Fedor,* 349 S.C. 169, 175-76, 561 S.E.2d 654, 657 (Ct. App. 2002) (noting that where plaintiff's deposition testimony concerning what a third party told him about settlement negotiations, which was offered to establish that plaintiff could have recovered more absent alleged malpractice by defendant attorney, was hearsay that was inadmissible).

In order to establish the required proximate cause question of fact, YES was required to present testimony ***from Justice,*** as a party to the oral agreement, and as the ultimate decision-maker. Only Justice himself could testify as to what he would or would not have done if McLeod had advised him that he was under investigation by the IRS, but still recommended proceeding with the conservation easement. YES recognized this

testimony from Justice was required, but improperly attempted to circumvent this requirement by introducing Miller's hearsay testimony. The circuit court properly excluded this inadmissible hearsay testimony.

1. The Circuit Court's Ruling

Following the argument of counsel, during which time the Respondents detailed the inadmissibility of the subject evidence based upon the reasoning and cases discussed above, the circuit court expressed concern over the above testimony. YES notes that the circuit court took an individual knowledge approach, versus a corporate knowledge approach. (R. p. 673, lines 13-24). Nevertheless, the circuit court did not specifically rule on this objection at that point in the proceeding. Rather, following subsequent argument by counsel the circuit court finally ruled on the objection. The second ruling involved this testimony: "I'm not going to allow, I have already ruled, page 36, lines 10 through 23, and I'm not going to allow the question on page 34, 2 through 15." (R. p. 681, line 24-p. 682, line 1) (emphasis added). From that ruling it is not clear that the circuit court rested its decision upon its initial individual knowledge versus corporate knowledge reasoning. YES did not ask the Court for clarification. (R. p. 682, lines 23-24).

As discussed above, the subject testimony was properly excluded because it was inadmissible hearsay testimony. To the extent the circuit court excluded the testimony for a different reason, the same correct result was reached: exclusion of the testimony. Accordingly, any error complained of by YES is harmless error. *See S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 498, 732 S.E.2d 205, 213 (Ct. App. 2012) (noting that "whatever doesn't make any difference, doesn't matter").

III. The Circuit Court Correctly Excluded Testimony of Other Projects

During McLeod's direct examination, his counsel sought to elicit testimony regarding three other projects that McLeod was working on during the same timeframe he was working on Justice's conservation easement. (R. p. 390, line 15-p. 391, line 7). The Respondents responded by asking the circuit court to take up a legal matter outside the hearing of the jury. The circuit court granted that request. (R. p. 391, lines 8-11).

The Respondent then allowed Mr. McLeod to provide a proffer.

> THE COURT: Leave Mr. McLeod there for a moment in case you want to proffer some testimony.
>
> All right, for purposes of the record, Mr. Pendarvis, go ahead and ask your next question, then I want to hear the objection, I want to see where this is going.
>
> MR. PENDARVIS: The question would be, Mr. McLeod, was Yancey Environmental Solutions [YES] working on other conservation easement matters in the November, December time period, 2007?
>
> At a late point in the testimony, I'm trying to keep this chronological for the jury, but at a point in time in late December there is evidence these other easements were recorded, the easements went through and Mr. McLeod - -
>
> Q. Let's fast forward to that point. Mr. McLeod, you received, this is in context of after having received the IRS letter, after Richardson Plowden had withdrawn, Mr. Hanlin had withdrawn, did you communicate to your other clients any information about the IRS letter?
>
> A. I called all four clients with whom I was working on conservation projects in the year 2007 after receiving the IRS letter and told each of them about the letter.
>
> Q. Did any of those four easements close in the year 2007?
>
> A. Three of them did.
>
> Q. And which easement did not close in the year 2007?

A. Mr. Justice.

Q. Did you relay the same information about the IRS letter to all four of those landowners?

A. I did.

Q. And notwithstanding the information about the IRS letter, did the other three easements close?

A. Yes, sir.

Q. I would like to show you a copy of, I have a couple, the letters that memorialize recording or recorded copies of the easements.

(R. p. 391, line 22-p. 393, line 12).

Following this proffer, the Respondents articulated the basis of their objection.

> In all of those cases those three landowners or tax attorneys or whoever he talked to, you know, for whatever reasons they may have had, including they may have been done, their work may have all been done, I don't know, but Mr. Hanlin was not involved in any of those transactions, so what the jury is being asked to speculate about is, "Well, we know that three other people in three separate deals with separate lawyers, separate facts and circumstances made their decision to go ahead and record, that means Mr. Justice would have," and that is, you [know], Your Honor, that is not admissible to show what Mr. Justice would have done.

(R. p. 394, line 24-p. 395, line 12).

Following the counter argument of YES, the circuit court decided to exclude testimony of the other projects on which McLeod worked in 2007. The basis for his ruling was as follows:

> I think that under Rule 403, that although relevant, this is going to create confusion to the jury. That is what I think. It is too much information.
>
> . . . .

> [I]t is my ruling that we not bring those other three deals into this trial because of the, my belief is the relevance would be outweighed by the confusion and misleading the jury as to these decision makers that had to make such an unusual type conservation easement.

(R. p. 427, line 2-p. 428, line 2).

A. The Circuit Court Properly Exercised its Discretion

The trial court properly exercised its discretion in excluding the evidence. "'An appellate court reviews Rule 403 rulings pursuant to an abuse of discretion standard and gives great deference to the trial court.'" *Johnson v. Horry County Solid Waste Authority*, 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2012) (citing *Lee v. Bunch*, 373 S.C. 654, 658, 647 S.E.2d 197, 199 (2007). "'A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.'" *Id.* at 534, 698 S.E.2d at 838 (citing *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). The trial court determined that introducing evidence of the other three projects would likely confuse or mislead the jury. Accordingly, the trial court properly exercised its discretion and ruled to exclude testimony on YES's other three projects.

B. YES Did Not Make an Adequate Proffer of the Excluded Testimony to Challenge the Circuit Court's Decision

"An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in the absence of an adequate proffer of evidence in the court below." *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990). After the Respondents objected to YES's line of questioning, the circuit court allowed McLeod to make a proffer. As noted above, McLeod testified that he worked on four conservation easements during 2007, that he told all of the landowners about the IRS

investigation, and that all of the landowners closed except for Justice. The information McLeod provided to the circuit court did not create a sufficient basis for establishing prejudice.

The Respondents argued to the circuit court that YES should not be allowed to introduce the other transactions because of their dissimilarity to the proposed conservation easement on the Farm. The objection related to the well-established rule of other incidents evidence. In South Carolina, "evidence of similar accidents, transactions, or happenings is admissible . . . where there is some special relation between the [transactions] tending to prove or disprove some fact in dispute." *Watson v. Ford Motor Co.*, 389 S.C 434, 454, 699 S.E.2d 169, 179 (2010). "A plaintiff bears the burden of demonstrating the other [transactions] are 'substantially similar to the [transaction] at issue.'" *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 77, 735 S.E.2d 650, 657 (2012).

In order to introduce such evidence, the proponent "must present a factual foundation for the court to determine that the other [transactions] were substantially similar to the [transaction] at issue." *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). In making the substantial similarity analysis, the Court must analyze four factors: (1) the [transactions] are similar; (2) the alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other incidents. *Watson*, 389 S.C. at 543, 699 S.E.2d at 179. The substantially similar standard exists because other incident evidence "has the potential to be 'highly prejudicial.'" *Branham v. Ford Motor Co.*, 390 S.C. 203, 230, 701 S.E.2d 5, 19 (2010).

YES's proffer made no effort to set forth a proper foundation to show that the other projects were substantially similar to the proposed conservation easement on the Farm. In an effort to remedy the failure to provide an adequate proffer, YES cites the deposition testimony of McLeod in the brief it filed with this Court. (Appellant's Brief, pp. 34-35). The testimony McLeod provided in his deposition has no bearing upon the correctness of the circuit court's decision. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (noting that issue preservation rules exist to "enable the lower court to rule properly after it has considered all relevant facts, law, and arguments'") (quoting *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). Accordingly, YES's inclusion of the deposition transcript is not proper, and the court is not obligated to review that testimony in its analysis of this issue.

Inadequate proffer in the trial court aside, the deposition transcript of McLeod does not even provide this Court with the proper factual foundation to determine whether the other projects, in 2007, were substantially similar. For example, McLeod does not state whether the other projects were of the same magnitude as the proposed conservation easement on the Farm. He does not state whether the other projects had already been completed. Accordingly, YES has failed to demonstrate prejudice. *Greenville Memorial*, 301 S.C. at 244, 391 S.E.2d at 547.

IV. The Circuit Court Correctly Excluded Its Consideration of the Inadmissible Hearsay Testimony Provided by Adams During Its Decision to Grant a Directed Verdict

YES argued that the circuit court erred by not considering Professor Adams' re-statement of Miller's re-statement of Justice's alleged statement that he was "in the boat." Adams provided this testimony during his cross-examination:

> I think all of the testimony in this case has shown, with not a single contradiction, that [Mr. Justice] was firmly committed. He, as the testimony said, he was in the boat, he had made that decision, he was going to do it, when the package of documents came for the closing he was going to sign them, they were going to be recorded.

(R. p. 266, lines 15-21). The circuit court properly excluded the above testimony from its consideration of the directed verdict motion because it was inadmissible hearsay relied upon by an expert. The Respondents were not required to enter a contemporaneous objection or a motion to strike.

A. The Testimony is Hearsay

The subject testimony is hearsay. Both parties agreed on that very point. In trying to sort out what testimony had been redacted from Miller's video-taped deposition, the circuit court queried:

> THE COURT: Did you all agree on all the hearsay stuff, that has all been eliminated, redacted from the video, it is clear Mr. Justice told him?
>
> MR. PENDARVIS: That part is out. The part, "I'm in the boat," that little section is out, it's not in the tape.

(R. p. 680, lines 14-20).

B. The Hearsay Statement by Adams Was Not Admissible for Its Truth

The use of hearsay by an expert is not admitted to prove the truth of the hearsay asserted; rather, pursuant to Rule 703, SCRE, it is admitted to explain the basis of an expert witness's opinion. *Jones v. Doe*, 372 S.C 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006). The *Jones* Court explained that:

> [t]he expert may testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. It is received only for the limited purpose of informing the jury of the basis of the expert's

> opinion and therefore does not constitute a true hearsay exception.

Id. at 63, 640 S.E.2d at 519 (quoting 2 Kenneth S. Broun et al., McCormick on Evidence § 324, at 418 (2006)). Adam's hearsay statement could not be used for its truthfulness. It is for that reason that the Respondents did not need to object to this testimony. It is for that reason, as well, that the circuit court properly excluded the testimony from its consideration. *Jones*, 372 S.C at 63, 640 S.E.2d at 519 (disregarding hearsay evidence relied upon by expert witness and affirming the granting of summary judgment).

YES argues that since no objection was placed on the record, the testimony of Adams became competent evidence. To support that proposition YES cites to *Cantrell v. Carruth*, 250 S.C. 415, 158 S.E.2d 208 (1967). According to YES, Cantrell stands for the proposition that "evidence admitted without objection becomes competent evidence and cannot be disregarded on a motion for a directed verdict." (Brief of Appellant, p. 38). Cantrell is distinguishable because it did not address the unique role of Rule 703 and an expert's ability to testify regarding otherwise inadmissible hearsay evidence. Cantrell merely stands for the proposition that if otherwise admissible, yet objectionable, testimony is introduced without objection, then the failure to object to that evidence precludes a party from challenging the use of that testimony for purposes of a directed verdict.

Cantrell fell and was injured when she sought to get out of the way of a delivery truck owned by defendant Carruth. *Cantrell*, 250 S.C. at 417, 158 S.E.2d at 209. Cantrell alleged that Carruth was liable for her injuries because his delivery truck approached her in a negligent and reckless manner, and for that reason she fell trying to avoid it. *Id.* at 419, 158 S.E.2d at 210. After the close of the evidence, the circuit court

directed a verdict in favor of Carruth. On appeal, Cantrell pointed to evidence tending to prove her negligence claim.

She directed the court to her testimony that, "the pickup truck was coming at her 'too fast' and she started to run in order to get out of its way because she 'would have been dead' if she hadn't gotten out of the way." *Id.* at 420, 158 S.E.2d at 210-11. Cantrell further noted that no objection was entered to that testimony. *Id.* at 420, 158 S.E.2d at 210-11. Carruth argued that that testimony was nothing more than a "conclusion on the part of the appellant and no weight c[ould] validly be assigned to" it. *Id.* at 420, 158 S.E.2d at 211. The Supreme Court disagreed, noting that, "[s]ince the foregoing testimony was received, without objection, it bec[a]me[] competent and c[ould] [not] be disregarded upon a motion for a . . . directed verdict." *Id.* at 420, 158 S.E.2d at 210-11.

The testimony noted in *Cantrell* was admissible, yet objectionable, evidence to establish the truth of Cantrell's allegations. Consequently, the failure of Carruth to object meant that the testimony could be used in the Court's analysis of the directed verdict motion. The hearsay testimony from Adams was not admissible to establish the truth of YES's allegations. Accordingly, it could not serve as a basis for the circuit court's analysis of the directed verdict motion.

C. The Hearsay Testimony is Not Relevant to the Proximate Cause Issue

The testimony that Justice was allegedly "in the boat" only related to the intent of Justice to proceed with the concept of placing a conservation easement on the Farm. It had nothing to do with proceeding, notwithstanding the IRS investigation into McLeod. The following colloquy with Miller makes that point clear:

> Q. Okay. Who else did you speak to recently after being presented with the draft affidavit?
>
> A. I asked Mr. Jim Justice what his feeling was toward this, about this transaction, and he gave me a brief synopsis of what he thought was going on and how it would have ended up. And that was the only individual I talked to, the rest of it was just looking through the documents that we had in our files.
>
> Q. Okay. Tell me exactly what Jim Justice told you. You said it was a brief synopsis, what did he tell you?
>
> A. I said, Jim, I'm going to be doing a deposition on the Yancey McLeod issue from 2007, you're familiar with that? Yes. Do you feel that that thing would have worked out had it played out to the end and he said absolutely. And that was my only question to him because that was a concern that I had, would this have moved forward, and he said, We were in the boat. That was his exact words, We were in the boat on this and it would have worked out.

(R. p. 921, line 16-p. 922, line 12). It would have "worked out," but the IRS started an investigation of McLeod on December 17, 2007, and he recommended that Justice postpone the project. (R. p. 533, lines 15-25). The above testimony does not state what Justice would have done had McLeod recommended that Justice proceed with the conservation easement, notwithstanding the IRS investigation.

The circuit court's decision did not rest on Justice's intentions; it rested upon the absence of testimony from Justice about what he would have done, had McLeod both notified him of the IRS investigation and recommended that he move forward. (R. p. 12). The record of this trial is void as to what Justice would have done under that scenario. For that reason, YES's reliance on that testimony is misplaced.

V. The Circuit Court Applied the Correct Standard in Deciding that No Question of Fact Existed on Proximate Cause

When a party moves for a directed verdict, the court must "view[] the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (citations omitted). In doing so, the Court is not tasked with "decid[ing] credibility issues or to resolve conflicts in the testimony or evidence." *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (citations omitted). The role of the Court is to "determine whether a verdict for the party opposing the motion would [be] reasonably possible under the facts." *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997) (citations omitted). The Rule 50 standard "does not[, however,] authorize submission of speculative, theoretical and hypothetical views to the jury." *Id.* at 149, 485 S.E.2d at 908. South Carolina appellate courts have "repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation." *Id.* at 149, 485 S.E.2d at 908.

Contrary to YES's argument in its brief, the circuit court did not weigh the evidence; it decided there was ***no evidence***. Following the circuit court's decision to grant a directed verdict, YES attempted to steer the court into discussing the weight of the evidence.

> MR. PENDARVIS: Your honor, one last thing. You don't think there is the weight the evidence carries but there is evidence and I think the court might want to take a look, our response would be, Your Honor, on a directed verdict it is not the weight of the evidence, it's the existence of it.
>
> THE COURT: That is what I'm saying, there is the existence of no evidence of what Jim Justice, everything is

> consistent with what, there is an absence of evidence what Jim Justice would do, an absence.

(R. p. 874, line 23-p. 875, line 8). YES's references to statements by the circuit court that it was "wrestling" with its decision do not reflect a weighing of the evidence; rather, they reflect a judge *wrestling* with the burden of knowing that the law required him to direct a verdict against a litigant that had spent a lot of time and energy presenting its case but had failed to present testimony or other evidence to support its legal theory.

CONCLUSION

Justice was the decider; however, his decision was never presented at the trial. The circuit court ruled correctly and was within its discretion in excluding the challenged testimony. The circuit court correctly applied the Rule 50 standard of review. Accordingly, the circuit court properly directed a verdict in favor of the Respondents. The Respondents respectfully submit that the decisions of the circuit court should be affirmed and its Order upheld.

Respectfully submitted,

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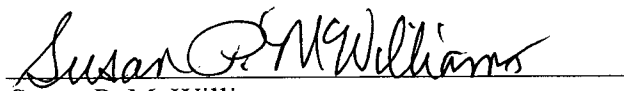

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September 3, 2013

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge
DeAndrea G. Benjamin, Circuit Court Judge

App. Case No. 2012-212687
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YANCEY ENVIRONMENTAL SOLUTIONS, LLC .....Appellant,

vs.

RICHARDSON PLOWDEN & ROBINSON, P.A. and
GEORGE HAROLD HANLIN, J.D. .....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that this 3rd day of September, 2013, I have served the foregoing Final Brief of Respondents via U.S. Mail, first class postage prepaid, on the following counsel:

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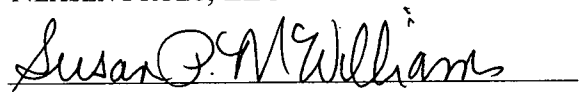

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